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Supreme Court of the United States

OCTOBER TERM, 1934

No. 16

COMMONWEALTH OF VIRGINIA, Petitioner

vs.

IMPERIAL COAL SALES COMPANY, INCORPORATED, Respondent.

BRIEF FOR IMPERIAL COAL SALES COMPANY, INCORPORATED, FOR HEARING ON CERTIORARI.

ON CERTIORARI GRANTED TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PRELIMINARY STATEMENT.

Having been advised by the attorney for Petitioner, Commonwealth of Virginia, that the brief filed in support of the Petition for a Writ of Certiorari would be adopted as the opening brief, this brief is filed in further answer to the position taken for the Commonwealth of Virginia.

We respectfully request that the Court consider the brief filed for the Sales Company in opposition to the granting of the Writ of Certiorari to be read along with this one, which will be supplemental thereto.

In the interest of brevity the Petitioner will be referred to in this Brief as the State and Respondent, Imperial Coal Sales Co., Inc., as the Company.

The following letters will be used to designate the record, petition and brief in support thereof, and brief in opposition to granting the Writ of Certiorari:—

(R.) Transcript of Record.

(P. & B.) Petition for Writ of Certiorari—and brief in support thereof.

(R. B.) Brief of Respondent—in opposition to Petition for Writ of Certiorari.

Italics when used are supplied unless otherwise stated.

I.

Opinion of the Court Below.

We call attention of the Court to the opinion of the Court below original (R. page 46) and on rehearing (R. page 61). These opinions are reported in 161 Va. 718, 107 S. E. 268 and 161 Va. 736, 172 S. E. 927, respectively.

II.

Jurisdiction.

The point in this connection is that this Honorable Court is being asked to review a question which is apparently a moot question in this case, and pass on the constitutionality of a state tax as applicable to the Company (doing solely an interstate business), when not only has it not been determined that the Company is subject to the tax, even if it should be held constitutional, but on the contrary the State Court has strongly intimated, if not actually decided, that the tax in question does not under the Virginia Statutes apply to this Company. In other words, even if this Court should take jurisdiction of the constitutional question and hold that the statute would be valid, the decision would not determine the question of whether the Company is liable to the tax (which is a

question for the State Court) and so the decision of this Court would be contingent—that is that the tax would be valid, if applicable.

The State is in effect asking this Court to decide this question—"If the State Court shall hereafter decide that the Company is, under the State Statutes, liable for the so-called tax on capital, would the statutes be invalid under the commerce clause of the Federal Constitution?" You are thus asked to give a conditional decision.

That such is the situation, we submit, is clear as shown in the treatment of the question in our brief filed here (R. B. pages 2-5) inclusive, to which we refer this Court.

In addition to what is said there, we call the attention of the Court to the opinion of the State Court, as follows:

> "What has been said about doing business in Virginia in connection with the Income tax (that question is not involved here)—applies here,—"

Referring to the opinion on the income tax assessment, and which the Court states applies on the question of the capital tax assessment, we find that the State Court, after reviewing the conduct of the business of the Company, states as follows:

> "It is true, that by maintaining the Lynchburg office, the Sales Company, in a limited sense, is doing business in Virginia, but that business arises out of, is inseparable from and incidental only to, the principal business of selling coal in interstate commerce. The so-called Virginia business is simply one of the necessary results of the interstate business done, upon which the Virginia business is founded and continues and without which it could not exist. It is a consequence which follows in the chain of events, all others of which take place outside of Virginia. The business done in the Lynchburg office, severed from the principal business of selling coal in interstate commerce, would be reduced, almost immediately, to nothing.

> In other words the real business of the Sales Company is selling coal in interstate commerce and not the activities necessary to keep books of accounts, bank accounts, and other clerical work, such as is done in the Lynchburg office." (R. page 49-50.)

The quotation used in the decision of the income tax question was thus referred to and adopted by the Court on the capital tax question and on this question the Court concludes that:—

> "No part of this property is used in any Virginia transaction whatever. It produces nothing in this State—" (R. page 52.)

It will thus be seen that the State Court decided that the Company had no appreciable property in Virginia and did no *intrastate* business and then the State Court referred to Tax Code Section 427 as showing the legislative policy, as follows:

> "Which seems to be in favor of exempting the Sales Company, under the peculiar facts of the case, and other like corporations, doing a similar business, from any capital or income tax. When Section 427 is read and considered, along with other related sections, *it unmistakeably shows a strong leaning and intent on the part of the law makers to exclude such corporations as the Sales Company from State taxation.*" (R. page 52.)

The Court then quotes from Section 427, and then states:

> "However, we *prefer* to rest the decision . . . upon the broad proposition that it is invalid because it is a burden upon interstate commerce . . . ."

There we have the Court saying that the capital tax statutes apparently do not apply to the Company, which seemed to be expressly exempted, but in any event if applied to the Company it would be unconstitutional.

That the respondent Company is not taxable under the Virginia statute, and it would be so held is further shown by the decision of the Virginia Court in the case of *Commonwealth* v. *Castner, Curran & Bullett,* 138 Va. 81, 121 S. E. 894, 900. In this case the Court, it is true, was dealing with a license tax of a Company doing the identical business that the respondent Company here was doing, though it was a foreign corporation, but the Court concluded its opinion with a general statement that the business was not subject to State taxation in the language as follows:

> "Undoubtedly it is doing business in this state, and this business is a profitable one, but the business in which it is engaged is one that is not subject to state taxation."

Here the Court has announced the doctrine in a previous case that the business such as is being done by the respondent here is not subject to state taxation.

We submit that the result is as we stated in our treatment of this question in our first brief here (R. B. page 2-5) and as claimed in the opening statements above—that in that the Court here is asked to decide that the tax would be valid if the State Court should decide (against its inferred and intimated opinion) that the statutes do apply to the defendant Company.

We further submit that the State should first secure a decision from its own court that the Company is, under the statutes, liable for the tax, before bringing the Company before this Court and asking this Court to make a decision that the tax will be valid if the State Court should decide that it applies to the defendant Company.

See cases cited (R. B. pages 4 and 5.)

We further call the attention of the Court to the well established principle that before one can complain of a decision he must show that he is injured by such decision

and "until that has been done it is, so far as he is concerned, a moot question."

Carpel, etc. Inc. v. *City of Richmond, (Va.),* 175 S. E. 316 (7) page 319.

Also in *Gorieb* v. *Fox,* 274 U. S. 603, 606 and cases cited, in which the Court refers to the fact that "it does not appear that the alleged constitutional feature of which he complains has injured him or operated to deprive him of any rights." Citing numerous cases.

In *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544, 545, 58 L. Ed. 713, 719, 720, 34 Sup. Ct. 359, the question raised depended on what the situation would be if an administrative body should act arbitrarily. The Court held in effect that the time to raise the constitutional question would be after such action by the administrative body and until such action there was no injury nor reason for raising the constitutional question.

So in *Jeffry Mfg. Co.* v. *Blogg,* 235 U. S. 571, 576, 59 L. Ed. 364, 368, 35 Sup. Ct. Rep. 167, the opinion says:

> " . . . for it is the well settled rule of this Court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of."

The opinion cites numerous cases for this "well settled rule."

In *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, 180, 181, 67 L. Ed. 929, 936, 937, 43 Sup. Ct. Rep. 470, the question involved the construction of a state tax provision and the Court says:

> "It apparently requires a construction of the particular provision along with other parts of the act, and possibly the State constitutional provision. *After that it may be that there would be need of turning to the 14th Amendment.* 'Only those whose rights are

directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto'."

The Court cites three cases for the proposition including *Plymouth Coal Co.* v. *Pennsylvania, (supra).*

It is submitted that unless and until the Virginia Court holds that the capital tax statutes apply to the defendant Company the constitutional question is moot and the State is not injured. If the State Court should hold that the Statutes do not impose the tax on the defendant Company (as they have intimated) then the constitutional question is immaterial and the State is not affected thereby. Certainly at the present time it is at most problematical whether the State is hurt by the decision on the constitutional question and it would seem that the appeal to this Court is at best premature and the Writ of Certiorari should be dismissed.

III.

Statement of the Case.

The case is sufficiently and properly stated in P. & B. pages 9-11, and R. B. pages 6-7, with the exception of details which we regard as unimportant and such statements may therefore be accepted.

IV.

Specification of Error.

(Petitioner's Apparent Claims.)

If the question of jurisdiction be disregarded, apparently the whole case for the State is based on the contention that the tax in question should be upheld as valid, since the burden on interstate commerce is so indirect as not to amount to a regulation thereof, such as is forbidden by the Commerce Clause of the Federal Constitution.

V.

Argument.

We refer the Court to our brief in opposition to granting of the Writ of Certiorari (R. B. pages 8-10) for our argument on Points A and C as raised in the Brief in support of the application for the Writ and which brief is now adopted as the opening brief. (See P. & B. pages 11-12 for Point A and pages 22-24 for Point C.)

We feel it unnecessary to present further argument on these points, except as to Point A, to say that the record shows that the Company has for years been assessed with a tax on its money in bank and has paid such tax each year, and though the statutes here involved have been in effect for years there has never before been any attempt to assess such a tax as is now involved. For years the State administration authorities have evidently construed the statutes as exempting corporations doing a business, such as the defendant Corporation is doing.

There was in recent years some change in the language of the capital tax statutes, but none which in our opinion makes any difference in the substance of such statutes, so far as the question here is concerned. The practical interpretation placed on statutes by administrative bodies over a period of years has great if not controlling weight in the interpretation by courts, except for most cogent reasons and unless clearly erroneous.

See 58 C. J. p. 1028 and authorities cited in notes 48 and 49 including numerous U. S. Supreme Court cases.

Such construction is "especially weighty in case of statutes prescribing penalties or levying impositions."

Same, page 1029, note 53:

> "In some cases the Court has treated contemporaneous and long followed construction of an ambiguous statute by executive officers as controlling."

Same, note 54, citing, *inter alia,* two cases from this Court.

Point "B."

This contention as raised by the State is apparently the real contention of the State—viz.:

> "Even though the respondent was engaged solely in interstate commerce and owned no real estate and no tangible property in Virginia, the tax was valid, since the burden is so indirect as not to amount to a regulation of interstate commerce."

This point is discussed for the State in their Brief (P. & B. pages 13-22.)

It is also discussed in our brief in opposition to granting of the Writ of Certiorari (R. B. pages 10-15). We refer the Court to that discussion and in addition wish to add the following:

It will be noted that the cases cited for the State were all cases in which there was real estate and tangible property in the State and owned by the taxed Company. Where such is the case it has been uniformly held that the State may tax such property, though used in interstate commerce, either at their independent extrinsic values, or as a part of a going business, and in the latter case may reach the taxable value by a comparison of the property and the business in the State with the total property and business of the Company—i. e., use the proportionate intrastate property and business as a *basis* to determine the value.

See *Galveston, Etc. Rwy. Co.* v. *Texas,* 210 U. S. 217, 52 L. Ed. 1031, 1036.

In all such cases there is a definite and positive basis for the tax in separate and independent property in the State and State business which exist and would or could continue to exist without the interstate business, and therefore the burden on interstate commerce is held to be indirect. In the instant case there is nothing tangible which does or could exist without the interstate business, nor any intra-

state business to supply the basis for any such tax, which would therefore be a direct burden. As said by the State Court, the Company owns no real estate or tangible property located in Virginia, and does no business in Virginia and

> "The business done in the Lynchburg office severed from the principal business of selling coal in interstate commerce, would be reduced, almost immediately to nothing." (P. & B. page 49-50.)

The Company has nothing and does nothing in the State of Virginia except what follows as an incident to its business of selling coal located in West Virginia to purchasers in other states. That all such is an inseparable part of interstate commerce see opinion of Mr. Chief Justice Hughes in *Frust* v. *Brewster,* 282 U. S. 493, 51 S. Ct. Rep. 295; 75 L. Ed. 478 quoting from *International Text Book Co.* v. *Pigg,* 217 U. S. 91, 54 L. Ed. 687.

Oddly, as it seems to us, the brief for the State (P. & B. page 18) refers to the *Glouchester Ferry Company* case (114 U. S. 210) as approving a state ad valorem tax on *"Intangible"* property (the lease of a wharf) (P. & B. page 18). A lease is an interest in real estate and leases are classed and taxed as real estate. Such do and can exist independent of any interstate business. This Court recognized that when it said in the quotation used for the State (P. & B. page 18):

> "Whether *that wharf* is taxed to the owner or to the lessee it matters not . . . "

It is further noted that in the *Glouchester Ferry Company* case the attempted tax was held to be invalid as only a negligible portion of the capital stock was represented by property subject to Pennsylvania's jurisdiction.

It is stated in Petitioner's Brief (P. & B. page 16) that the decisions make no distinction between tangible and intangible property. We respectfully submit that such is not the case.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 69 L. Ed. 916, the State attempted to assess an excise tax on the value of the corporate excess employed in the Commonwealth also on income derived from business in the same. The tax was resisted as contrary to the commerce clause of the U. S. Constitution. This Court held that the question to be answered was

> "May a state impose upon a foreign corporation which conducts only an interstate business within its borders an excise tax measured by a combination of two factors—*The proportion of the total value of capital shares attributed to transactions therein and the proportion of net income attributed to such shares.*"

The decision of the Massachusetts Court was reversed, the Court stating:

> "plaintiff in error did no local business and there was no *proper foundation for the excise.*" (L. Ed. p. 924.)

Further on the same page the opinion states:

> "The local business of a foreign corporation may support an excise measured in any reasonable way if *neither interstate commerce nor property beyond the state is taxed.*" and
>
> "It is settled that whether by way of duties laid on transportation of the subjects of interstate commerce, or on receipts derived therefrom, or *on the occupation* or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

It has been previously shown that the questions of the name of the tax or of whether the subject be a foreign or domestic corporation are immaterial. (See R. B. page 9 and page 13.)

It will be noted that the tax in the above case while designated as an excise tax was in fact a tax on capital and the Court decides that to be valid there must be a foundation in intrastate business done. Such does not exist in the case at bar.

So in *Pullman Company* v. *Richardson,* 261 U. S. 330, 67 L. Ed. 682, the Court held that a State could not tax the "act of engaging in interstate commerce nor lay a tax on gross receipts" and further that

> "The rule is otherwise with property used in interstate commerce. A state within whose limits such property is *permanently located* or commonly used, may tax it."

Obviously here the Court is referring to tangible and real property for none other would be *permanently located.*

It is interesting to note that the opinion of Mr. Justice Holmes in *Galveston, Etc. Ry. Co.* v. *Texas,* 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, expressly recognizes the distinction between tangible property, having an actual situs in a State and used in interstate commerce, and other forms of property, with respect to the right to tax in the quotation as set out in our brief in opposition to granting the Writ of Certiorari (R. B. p. 13) to which reference is here made. See also other cases cited on page 13-14 of same.

It is most significant that with the well known industry and diligence of States and their tax authorities for subjects of taxation, and their numerous and futile attempts to levy taxes on subjects not properly taxable as disclosed in the decisions of this Court, not a case has been cited in which a Court has upheld a tax such as is here sought to be imposed—a tax on a subject doing, admittedly, an exclusively interstate business with no real or tangible property in the State nor any intrastate business as a basis for such tax. Indeed, with the possible exception of the Ozark

Pipe Line case, to which we shall refer below, the cases do not disclose that such an attempt has before been made to tax the cash in bank and bills and notes receivable—all the direct proceeds of interstate commerce—as capital, against such a corporation. Surely the reason must be that it was known that such tax could not be properly levied or attempt would have been made.

We refer the Court especially to the case of *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, 45 Sup. St. Rep. 184, 69 L. Ed. 439 which in our opinion is, on principal, not to be differentiated from the case at bar, and which was used in the opinion of the State Court as controlling. (See opinion R. p. 54-6.)

In that case the Corporation was a Maryland Corporation, and had a pipe line running through the State of Missouri. It had its principal office in Missouri, kept its books and bank account there, paid employees in the State from its office, engaged therein labor to conduct its pumping plants to accelerate the passage of oil, and owned and operated automobiles and trucks in connection with its business. It neither received nor delivered any oil in Missouri. Missouri undertook to assess a tax on the "capital stock and surplus employed in the State," which part so employed in the State should be deemed to be "that proportion of the entire capital stock and surplus that its property in this State bear to all its property and assets wherever located." It is to be noted that this was a tax on capital engaged in business just as is the Virginia tax. The Missouri Court sustained the tax but on appeal the case was reversed by the Supreme Court of the United States, holding that the tax was invalid as being an interference with interstate commerce. The operation of the pipe line was interstate commerce and everything done in the State was incidental to such commerce. In that case the Corporation had received a Missouri license and had

the power thereunder to exercise the right of eminent domain. The Court held, however, that the tax was a burden on interstate commerce and invalid, and in refering to the tax, said:

> "The State has no such power even in the case of domestic corporations."

This case goes very thoroughly into the question of the right of the State to tax interstate commerce and we commend it to the Court. It is true in this case that the tax was designated a franchise tax, but it was a tax placed on the capital used in interstate business, and was in effect a tax on such capital, and in its effect is exactly the same as the tax attempted now to be assessed by the Tax Department of Virginia. Inasmuch, however, as there was no basis for the tax in any intrastate business done by the Company, it could not be sustained in this respect. It is differentiated from a line of cases in which both intra- and inter-state business is done, in which case the State can levy a tax and adopt different means for measuring the value of the intrastate business. In this Ozark case, as in the case at bar, there is no intrastate business done except such as is merely incidental and essential to the interstate business, and so the tax was void. (See discussion of this case in opinion of State Court, pp. 54-57.)

The so-called capital tax in the case at bar was in fact a tax levied on the cash in bank and bills and accounts receivable—less bills and accounts payable. Such cash and assets were in fact the direct proceeds of interstate commerce, in effect the gross receipts of such commerce with no deductions except bills and accounts payable, and which this Court has said in many decisions are not subject to State tax.

> *Pullman Co.* v. *Richardson,* 261 U. S. 330, 67 L. Ed. 682;

Meyer v. *Wells Fargo Co.*, 223 U. S. 298, 59 L. Ed. 455;
Express Co. v. *Minn.*, 223 U. S. 335, 56 L. Ed. 459;
Ozark Pipe Line v. *Monier (Supra)* (on receipts derived therefrom);
East Ohio Gas Co. v. *Tax Com'r.*, 283 U. S. 465; 51 S. Ct. Rep 499, 75 L. Ed. 1171;
Postal Telegraph Co. v. *Adams*, 155 U. S. 688, 39 L. Ed. 311 (on receipts derived therefrom).

We also commend strongly to the Court the opinion of Justice Gregory rendered in the State Supreme Court.

The suggestion is made (P. & B. page 5) that in the *Ozark Pipe Line* case the statute provided that a failure to make a report for assessment should cause the Corporation "to forfeit its right to engage in business" and in the *Alpha Portland Cement Co.* case the statute carried the right of restraint by injunction if the tax be not paid. That such provisions existed is true, but they had no influence on the decisions of the Court, as can be seen from the opinions. Such distinction was attempted in *Alpha Portland Co.* v. *Mass.*, 268 U. S. 203, 218-19, 69 L. Ed. 916, 924, in which the Court, after referring to a previous opinion in which the statute involved carried a provision for forfeiture of the right to do business for failure to conform, said:

> "Of course the opinion does not support the suggestion that the present statute is free from the fatal objection of the former one because payment of the tax is no longer a condition precedent to carrying on any business."

Conclusion.

We respectfully submit in conclusion:

(a) that the writ of certiorari should be dismissed for want of jurisdiction in this Court, and as raising what is at present a moot and contingent question.

(b) that even if the writ be not dismissed, the decision of the Virginia Court should be affirmed as being clearly right.

Respectfully submitted,

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